

## Chinese Marriages, as regarded by the Supreme Court of the Straits Settlements.

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When Penang and Singapore were first settled by the English, they were for all practical purposes uninhabited islands or at all events they were without settled institutions, as our Courts here and the Privy Council in England have held. In either view the Colonists brought with them as part of their baggage the Common Law of England, which is the birth-right of every subject and is portable property. But they carried with them only so much of the English law as was applicable to their own situation and to the conditions and wants of the inhabitants of the new Settlements. Furthermore in applying such law as was so applicable the Courts had to modify it to suit the above circumstances.

A part of the Common Law so imported into the new Settlements was the Statute of Distributions which regulates the distribution of the estate of an intestate amongst his next of kin and it is in connection with the application of this Statute to the Chinese race that the Courts in their reported decisions have considered the Chinese institution of marriage.

This Statute (22 and 23 Car: 2. c. 10) was passed by a Christian legislature for a Christian people and doubtless without any thought of its ever being applied to non-Christian peoples but from the time that the English became a colonizing race and the principles of the Common Law as applying to our new territories became settled our Courts and lawyers held that the English laws of inheritance were part of the general law applicable to the new plantations: as to which Blackstone is clear. The Statute of Distributions had, therefore, to be applied by the Judges in Penang and Singapore to the non-Christian and polygamous races in the Settlements over which their jurisdiction extended.

Now, the Statute contemplated marriage only in its Christian sense, that is to say, "the voluntary union for life of one man and one woman to the exclusion of all others", to use Lord Penzance's classic definition in *Hyde v Hyde and Woodmansee*, L. R. 1 P. & D. 133. Further polygamy had always been considered by the jurists as outside the pale of Christian Courts and international comity, as to which more will be said later. How then were the Courts of the Colony to apply this Statute based on monogamy to a state of polygamy?

Here was a Statute which spoke of one wife and gave to her a share in her intestate husband's estate; here was a Statute which, by common legal consent, when it spoke of children meant in England legitimate children to the exclusion of bastards and adopted children. How was such a Statute to be applied to the estate of a Chinese who died leaving a principal wife (*t'sai*) and several secondary wives (*t'sip*)? How was it to be applied to the adopted son of a Chinese when such a son by Chinese law and custom was as much legitimate as one born of the flesh? These and others were the knotty points which for the past hundred years the Courts of this Colony have had to settle and it is the purpose of this article to show from their recorded decisions how they have done so and how they have sought to justify themselves in so doing.

Penang was founded in 1786 and became a separate Presidency in 1805; in 1807 the Crown granted to it a Charter of Justice, which the lawyers here commonly call the first Charter. In 1819 Singapore was founded and in 1826 the Crown granted a second Charter of Justice to the two Settlements and to Malacca. These Charters contained clauses directing the Courts to have regard to the several religions, manners and customs of the inhabitants, and in particular to exercise their ecclesiastical jurisdiction only so far as such religions, manners and customs would permit.

In considering the question of the distribution of the estates of Chinese intestates our Judges had, therefore, to bear in mind the words of the Charters as well as the general common law rule which required them to modify English laws to suit the condition of the inhabitants of the Settlements. There was also a further principle by which one at least of them allowed himself to be guided, that of international comity.

With these preliminary observations it will be possible now to pursue our main subject.

In 1843, sitting at Malacca, Sir William Norris (Recorder, 1836-1847) held that the adopted son and daughter of an intestate Chinese (who left behind him no widow or widows apparently) were jointly entitled to letters of administration to his estate in preference to his lawful nephew and that the assets were to be divided between them to the exclusion of the lawful nephew. Sir William based his decision upon the Charter of which he took the same view as had been expressed by Sir Benjamin Malkin (Recorder, 1833-1835) in the case of *In the goods of Abdullah*, 1835, 2 Ky. Ec. 8, where Sir Benjamin observed "In the general expression the Charter seems to have intended to give a certain degree of protection and indulgence to the various nations resorting here, not very clearly defined, yet perhaps easily enough applied in particular cases, but not generally to sanction or recognize their law."

We have to wait until 1858 for the next recorded decision. In that year Sir Benson Maxwell (Recorder, 1856-1866; Chief

Justice, 1867-1871), unaware of the above decision, decided that an adopted child was not entitled to share. In the course of his monumental judgment in *Regina vs. Willans*, 3 Journ. Ind. Archip. 41, and 3 Ky. 16, he reconsiders his decision in the light of Sir William Norris' view with which however he still disagrees. The law is now definitely settled as Sir Benson Maxwell held it and the final recorded decision is that of Sir Theodore Ford in 1877 in *Khoo Tiang Bee et uxor vs. Tan Beng Gwat*, 1 Ky. 413.

In *Regina v Willans* Sir Benson Maxwell went into the question of the recognition by our Courts of Asiatic laws and customs very fully. The following passages, perhaps, illustrate his views sufficiently:—

“The law of England, wheresoever administered, respects, either *ex comitate* or *ex debito justitiæ*, the religions and usages of strange sects and nations to the extent to which the Charter requires that they shall be respected.”

“It does not seem to me that the Charter has in any respect modified the law of England by any exceptional adaptation of it to the religions and usages of the East.”

“Thus if a Mahomedan or Hindoo or Chinese marriage, celebrated here according to the religious ceremonies of the parties, be valid, it is not because the Charter makes it so for, as I have already observed, it makes no exception in favour of native contracts of any kind—but because the law of England recognizes it.”

He then points out that the general rule of that law is that the validity of a marriage is to be determined by the *lex loci celebrationis* and cites a passage from the judgment of Lord Stowell in *Dalrymple v Dalrymple*, 2 Hagg: 59.

“But where the law of the place is inapplicable to the parties, by reason of peculiarities of religious opinions and usages, then from a sort of moral necessity, the validity of the marriage depends on whether it was performed according to the rites of their religion.”

“In this place where the law of England has been for the first time brought to bear upon races among whom polygamy has been established from the remotest antiquity, the Court has had to consider the question, and has always held polygamous marriages valid. Whether the local Judicature erred, or not, in coming to this decision, I do not stop to consider. It is enough to say that if it decided rightly, it is not because our Charter demands an exceptionally indulgent treatment of the question, but simply because the principle which makes the validity of a marriage to depend upon the religions of the parties, extends to polygamous marriages; while, if the Court has been wrong, it has erred, not in adopting a principle foreign to, and at variance with the law of England, but in stretching beyond its legitimate limits, a perfectly well established one.”

Sir Benson, then, justified the recognition of polygamy in the Colony on the grounds of international comity and how bold and vigorous a decision that was will be seen when the state of legal opinion in England at the time (1858) is examined. Great writers on international law such as Kent, Burge and Story, put polygamy outside the pale of the comity of Christian nations without qualification, as did all the recorded decisions of the English Courts up to that time.

In 1861 Sir Benson Maxwell had an interesting Chinese case before him in Penang, the case of Nonia Cheah Yew vs. Othman-saw Merican and anor, 1 Ky. 160, in which he held that a Chinese female in this Colony is at liberty to marry, after being divorced from her former husband, notwithstanding that no guardian was present at such second marriage, the law of China to the contrary not being applicable to this Colony.

In Sir Benson's judgment he holds that by the law of China to render a second union a marriage there must be a person to give the woman away to the new husband and a delivery of marriage presents: otherwise it was considered simply as a case of concubinage.

"If this rule were in force here, it was plain that the marriage set up could not be sustained, for the plaintiff admitted that neither her uncle, the head of the family, nor any one else, gave her away. But the rule could not be held essential here under English law, where a very different degree of liberty and respect was accorded to women than in China or other parts of the East. In China a woman appeared to be, as in India, in a state of perpetual tutelage, and to be either under a general incapacity to contract, or to have no right to dispose of her person as she pleased. The necessity of giving away was not so much a part of the ceremony, as a consequence of the general law relating to the status of a woman. But here this must be determined by the English and not by the Chinese law."

The Recorder went on further to find that as a matter of fact no second ceremony of marriage took place at all, apart from the question of its legality.

The first part of the decision involved Sir Benson in a strange departure from the principle of comity which he had laid down in *Regina vs. Willans*. If the marriage was bad according to Chinese law, how could it have been valid according to the English Common Law?

Chinese law and custom, however, are rejected by the Court and an artificial creation substituted.

The above is the only recorded case in which the question of divorce amongst the Chinese has arisen. In it the judgment shows that a divorce paper was produced in evidence but how, or even if, the divorce was proved to have been valid according to Chinese law the report is quite silent.

In 1867 Sir Benson gave his famous decision in the case of *In the goods of Lao Leong An*, W.O.C. 35, 1 S.S.L.R. 1, in which he decided that the secondary wife (*t'sip*) of a Chinese intestate was entitled to an equal share of the intestate's property with the principal wife (*t'sai*).

In that case it was urged in resisting the claim of the secondary wife (*t'sip*) that her condition was not that of a wife but a concubine, that is to say, that her status was not a legal one at all and that she was without legal rights at all; a mere mistress, indeed. Sir Benson over-ruled the contention and held that she was a lawful spouse. He arrived at this result from a perusal of Sir George Staunton's translation of the Chinese Penal Code. It is unnecessary to go into his reasoning here as the matter will be dealt with later.

For forty years the Courts acted on this decision and it remained unchallenged until the famous Six Widows' case. Before turning to that case there are, however, one or two other decisions of the Court that need short consideration.

In 1887 in the case of *Lee Joo Neo vs. Lee Eng Swee*, 4 Ky: 325, Sir John Goldney held that in distributing the estate of a Chinese dying intestate domiciled in the Colony and leaving property in it, the Statute of Distributions is the only rule, and the exclusion of females in sharing in such estate according to Chinese law and custom will not be recognized.

It will be convenient, therefore, to observe here that the law of this Colony as it now stands gives to the widows, principal and secondary, the widow's share under the Statute to divide equally amongst them, whereas Chinese law would give them merely a right to maintenance. Again under Chinese law female next of kin are excluded, save in exceptional circumstances, from any share in the estate, though they may have claims to maintenance, whereas by the law of this Colony they take equally with males.

Our law is, therefore, very clearly neither English nor Chinese law but a mixture of the two.

In 1890 the question was raised in Penang before Mr. Justice Wood in the case of *Regina vs Yeok Boon Leng*, 4 Ky: 630, as to whether a Chinese could be convicted of bigamy. The accused was acquitted because the prosecution omitted to bring evidence that by Chinese law or custom the second marriage was void by reason of its taking place in the lifetime of the first wife.

In 1901 the same question arose at Malacca in the case of *The King vs Sim Boon Lip*, 7 S.S.L.R. 4, with most unfortunate results to the accused who was sentenced to three months' simple imprisonment. The accused was at first acquitted before Sir Archibald Law by a majority of four to three, but this majority being insufficient, a new trial was ordered which duly came on before Sir William Hyndman-Jones. It would appear, though it is not



expressly so stated in the report, that the accused took a second *t'sai* or principal wife in the lifetime of the first. By Chinese law this offence is punishable with ninety blows of the bamboo and the lady must be returned to her parents. The Acting Consul General for China at that time gave evidence that the second marriage was illegal according to Chinese law.

The conviction was most unsatisfactory and the defence of the accused would not seem to have been conducted too skilfully though very possibly the report does not do justice to the counsel concerned.

It should be mentioned that the custom in Penang, according to sworn evidence recorded in the Supreme Court there, is that a Chinese can have a *t'sai* in Penang provided his other *t'sai* is in China. The Penang *t'sai* would then be called a *peng t'sai*.

There are no other reported decisions on the law of bigamy as applicable to the Chinese but the present position in this regard can only be considered as very unsatisfactory.

We come now to the great Six Widows' Case as it is commonly called from the fact that in it six women claimed to be the lawful widows of the late Mr. Choo Eng Choon, a very wealthy and well-known Chinese gentleman, who was a British-born subject and domiciled in the Colony. The case is reported in Volume XII of the Straits Settlements Law Reports, where it occupies one hundred and six pages; it lasted from October 1905 to June 1909.

A determined attack was made on the settled law of the Colony by counsel for the son of the deceased by his first *t'sai*, and by counsel for a second *t'sai* whom the deceased married after the death of his first. The settled law was upheld by counsel (of whom the writer was one) for the women who claimed merely to be *t'sips*; and the attack upon it was over-ruled by Sir Archibald Law on appeal from Mr. Registrar Velge's findings, and by Sir William Hyndman-Jones and Sir Thomas Braddell on appeal from Sir Archibald Law.

For the sake of convenience the unsuccessful parties will be called the appellants, though before Sir Archibald Law all the parties concerned were appealing, and in the Court of Appeal several of them.

The first main argument put forward by the appellants was that the Chinese are not a polygamous race and that the expression polygamy imports an equality amongst the wives. They called a somewhat formidable array of expert witnesses amongst whom were Messrs. Tso Ping Sing, Consul-General for China, Suen Sze Ting, Acting Consul-General for China, and Lo Tseng Yao, a former Acting Consul-General for China.

The views of these three gentlemen may be summed up as follows and undoubtedly accord with a strong body of opinion amongst the educated Chinese of this Colony at the present moment.

- (1) According to the law of China a man can have only one lawful wife;
- (2) If the husband is of official rank, she is entitled to official honour through her husband;
- (3) The proofs of a legal marriage according to Chinese law are the three marriage documents, the six stages of the marriage ceremonies, the go-between and the fetching of the bride from her guardian's house in procession accompanied by a band;
- (4) In addition to his wife a man can take as many concubines as he pleases;
- (5) A concubine is only entitled to official honour through her sons but not through the father of her children who is not her husband but her lord and master;
- (6) A concubine may be purchased with money without any ceremony at all.

This seemed strong evidence that the Chinese are monogamous, but as Sir William Hyndman-Jones in his judgment said "however great the respect we may have for the opinions of the Chinese gentlemen who have given evidence upon the subject—all of them, excepting one, holding high official rank and one of them Mr. Lo Tseng Yao, being not only a high official of his own country and versed in its laws, but also, as I understand, a barrister-at-law of the Inner Temple—I say however great a respect we may entertain for the views of these gentlemen, we cannot allow them to decide this question for us. On the contrary, it is our duty to consider the position which the law of China has given to these women so far as we can gather it from all the sources above indicated and in the light of that law and having regard to the position and being aided but not restricted by the evidence to which I have referred, decide for ourselves the question whether the Chinese as a race are monogamous or polygamous."

In addition to the oral evidence of the experts, a large mass of written evidence was used in the course of the case in the shape of books and treaties upon Chinese law and custom.

It may be said at once that every Judge who has ever sat on the Bench of this Colony has, so far as is known, held the Chinese to be polygamous and so treated them. What these Chinese gentlemen who gave evidence overlooked was that the Chinese law gave to the women whom they called concubines a very definite legal status, not as high as that of the *t'sai* or principal wife it is true but such as to show that they stood in a very different position to that of mere mistresses or the subjects of casual connections.

There was, further, an even more important point which these gentlemen overlooked. The children of the *t'sip* are legitimate according to Chinese law and share with the children of the *t'sai* in their father's estate. How then are you to regard an union as

illicit when the offspring of it are legitimate? To declare the union of a Chinese with his *t'sip* as being outside the pale of the law of the Colony would be to bastardise a large proportion of Chinese born in the Colony, and to deprive of all rights numbers of women, most of whom have devoted years of their lives to the men with whom they lived.

Taking all the facts concerning the position of the *t'sip* into consideration Sir Benson Maxwell's view that they were lawful wives was upheld on reasoning similar to his. Sir William Hyndman-Jones summed the position up thus:—

“I have already said that in the diversity of opinion before us we must decide the question of monogamy or polygamy mainly by a consideration of the position which the law assigns to these women: and it appears to me that when you find that concubinage is not only tolerated by the law but recognised as a legal institution, then concubinage ceases to be that which Western nations are accustomed to understand by that name and becomes polygamy.”

The argument that polygamy imports equality amongst the wives was quite unsupported by authority and over-ruled. Indeed there was a clear English authority against it, the strange case of Christopher Bethell which may be considered with regard to this argument as well as with regard to the second main argument of the appellants namely that if the Chinese are polygamous then, as English Courts cannot recognise polygamy for any purposes, the Courts of this Colony cannot recognise their union at all.

In dealing with *Regina vs Willans* it was pointed out that up to the date of that case, 1858, all jurists put polygamy outside the pale of Christian nations. It is now necessary to see how the law in England had dealt with the matter between 1858 and the time when the *Six Widows' Case* was being argued.

It is obvious that in England a marriage might come before a matrimonial Court or might come before a Court which had merely to decide on rights arising out of the marriage. The English matrimonial Courts are purely Christian Courts and their machinery and weapons are only intended for use in dealing with monogamous unions: it is obvious that they would withdraw from any consideration of a polygamous union as between the parties to it. Whether the rest of the English Courts would refuse to adjudicate in any circumstances upon the rights of the issue of a polygamous union is another matter and as yet unsettled.

In 1866, in the case of *Hyde v Hyde and Woodmansee*, already referred to, a Mormon husband filed a petition for dissolution of his marriage on the ground of adultery. Lord Penzance said that it was obvious that the matrimonial law of England was adapted to the Christian marriage and wholly inapplicable to polygamy. In rejecting the prayer of the petition on this ground he was careful to add at the end of his judgment these words “this Court does not profess to decide upon the rights of succession or



legitimacy which it might be proper to accord to the issue of the polygamous unions nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

The only case in which the rights of the offspring of a polygamous union have come before the English Courts is that of *In re Bethell*, *Bethell v Hildyard*, L.R. 28 Ch. Div. 220, but unfortunately in that case counsel for the issue of the union made the admission that if the union was held to be polygamous there was an end to his client's case. Again, as will be seen, it was not a case of two members of a polygamous race marrying according to their own rites but of an English Christian making a union with a woman of a polygamous race.

Christopher Bethell left England for the Cape of Good Hope in 1878 and never returned: he was killed in Bechuanaland fighting as a trooper in the mounted police in an encounter between his force and the Boers. In 1883 he had gone through a form of marriage at Mafeking according to the custom of the Baralong tribe with a girl named Teepoo by whom he had a child. As he was the legatee of property in England under his father's will it became necessary for the English Court of Chancery to decide whether in the eyes of the law of England this child was legitimate, and an enquiry by the Chief Clerk of the Court was ordered. This Official certified that the Baralongs had no religion nor any religious customs and that polygamy was allowed in that tribe. He also certified that Christopher Bethell's domicile at the time of his marriage was English.

The evidence before the Chief Clerk showed that amongst the Baralongs "each male is allowed one great wife and several concubines who have almost the same status in the home as the great or principal wife" and the chief of the tribe in his evidence said "there are those who have two, three or four wives but the first is the principal wife."

Mr. Justice Stirling, as he then was, agreed that upon this evidence the Chief Clerk was right in finding that the Baralongs were polygamous: and he held that the law of England could not recognise the union. All the miserable infant got was its costs out of the estate! This is not the place to discuss the judgment, though it may be observed that the learned Judge held himself bound by the decisions of matrimonial Courts, in particular, by *Hyde v. Hyde and Woodmansee*, and that he made no mention of the saving clause already quoted at the end of the judgment in that case.

This case, however, was really the only one that the appellants in the Six Widows' Case could rely on as being in any way on all fours with the case which they were arguing.

On the other hand, in his work on Extraterritoriality Sir Francis Piggott, late Chief Justice of Hongkong and a jurist of considerable eminence, gives some very cogent reasoning to the effect that for the purposes of succession the English Courts would recognise the offspring of the union of, say, a Turkish man and woman as legitimate and entitled under the Statute of Distributions, while Professor Dicey regards the whole question as doubtful, certainly not as decided by Bethell's case or the matrimonial cases.

The Court of Appeal had little difficulty in over-ruling the appellants and they based their decision not on international comity, as Sir Benson Maxwell had done, but on the Charter, which he had refused to do. This charter was the third one of 1855.

The Six Widows' Case, however, added one new decision to the law relating to Chinese marriages. The Court held that a child legitimised *per subsequens matrimonium* according to Chinese law is legitimate and entitled to share in the two-thirds share which the Statute of Distributions gives to the children of a deceased intestate. In doing so the Court followed the well-known English case of *In re Goodman's Trusts*, L.R. 17 Ch. Div. 267, where a child similarly legitimised under Dutch law was held to be legitimate and entitled to share under the Statute in English property.

It now remains to notice the last two cases in the Colony, those of *Ngai Lau Shia vs. Low Chee Neo* in Singapore and *Cheang Thye Phin vs. Tan Ah Loy* in Penang, in both of which the author appeared as counsel for the claimant ladies, both here and in the Privy Council. Neither case is as yet locally reported but the decision of the Privy Council will be found in the Law Reports 1920 A.C. 369.

*Ngai Lau Shia* claimed to be a lawful daughter of the late Mr. Low Kim Pong, a wealthy Singapore merchant: she had attempted to prove a ceremony between the deceased and her mother as a *t'sai* but the evidence was disbelieved. It was then argued on her behalf that her mother should be presumed to have been a *t'sip* of the deceased from cohabitation and repute, in which she succeeded, the Court holding that such a presumption may be made upon proper evidence. It also decided that the Courts here will now take judicial notice of the fact that the Chinese are a polygamous race.

*Tan Ah Loy* claimed to be presumed to be a *t'sip* of the late Mr. Cheang Ah Quee, the last Captain China of Perak. She failed to prove a ceremony of any sort and Mr. Registrar Gibson found against her, as he was unaware of the decision in *Ngai Lau Shia's* case and thought that the Six Widows' Case had decided that some ceremony was necessary to constitute a proper secondary marriage. Her claim was upheld by the Court of Appeal and the Privy Council both of which held that no proof of a ceremony is essential, and presumed for her a marriage as a *t'sip* from cohabitation and repute.

In the case of Ngai Lau Shia the scholarly pen of Mr. Justice Ebdon has illuminated and summed up the whole views of our Courts on the subject of Chinese secondary marriages: and an article such as this would be quite incomplete and ineffective without reprinting in it the following passage from his judgment.

"The Chinese equivalent of the English word "marriage" in its most careful sense is used only of the man and only with reference to his union with the *t'sai*, the principal wife, chosen for him by his father or by the person under whose *patria potestas* he happens to be.

"If the man enters on a second *kit-fat* union [full marriage] during the lifetime of his *t'sai* he is punishable with 100 blows of the bamboo (the usual instrument) and the union is null and void.

"The man who degrades a *t'sai* to the level of a *t'sip* or raises a *t'sip* to the level of a *t'sai* is punishable with 100 or 90 blows according to the respective offences, and the ladies in each case are to be replaced in the position to which they are originally entitled. The process of elevation or reduction is not defined but the provision indicates that the *t'sip* has some position from which she can be wrongly elevated and to which she can be reduced.

"The *t'sai* becomes a relative of her husband's family and a 'senior to be treated with respect.' The *t'sip* does not enjoy these privileges. She cannot share the man's honours. She can attain to honours only through her sons.

"A man having married a *t'sai* at his father's choice may buy or 'acquire' as many *t'sips* as he pleases at his own. The *t'sai* is chosen from his own rank: he may take his *t'sips* from a lower class. But the *t'sip* may not any more than the *t'sai* be taken from the *Seh* [family name] of the man.

"As to this the "Book of Rites" mentions an interesting injunction by Confucius:—

"'In marrying a *t'sai* do not marry anyone of the same family name so as to make a distinction.

"'So in the purchase of a *t'sip* whose name is unknown find it out by divination.'

"This because the *t'sip* may be drawn from a class in which girls are the subject of barter and sale in their childhood with the result that her *Seh* may have been lost.

"The Manchu Code accepts the *t'sip* as having an established position in the Chinese family system and protects her in that position though it does not define it.

"Scholars and lexicographers have not hesitated to define the concubinage of the patriarchs as amounting to legitimate marriage though implying an inferior condition of the wife to whom the

husband does not convey his rank or quality: vide, e.g. definitions of 'concubine' and 'concubinage' in Webster's Unabridged Dictionary and in Wharton's Law Lexicon quoting John's Biblical Antiquities.

"If this view is true of the concubine of the Pentateuch it is certainly true of the *t'sip*. Abraham from motives of policy presented Sarai his wife, "a fair woman to look upon" as his sister to more than one royal suitor. The Pharaoh of the period met with great plagues in consequence—Ahimelech of Gerar received timely warning "in a dream by night."

"Under the Manchu Code Abraham would have received one hundred blows even for dealing by Hagar or Keturah his *t'sips* as he did by Sarai his wife.

"Again, if Staunton is right in his interpretation of section 116 of the Code, Abraham would have suffered castigation for his action in turning Hagar out into the wilderness merely to appease the jealousy of Sarai.

"Sentiment and the material feelings are doubtless often influences in the selection of a *t'sip*. The man's guardian chooses his *t'sai*. He chooses his *t'sip* for himself. There is a proverb to the effect that a *t'sai* is taken for her virtue, a *t'sip* for her beauty.

"But it seems to be fully accepted that the taking of a *t'sip* is authorised in order to the fulfilment of the dictates of filial piety which requires male issue for the purpose of ancestor worship.

"There does not seem to be any need to review what has been shown before the Courts on former occasions as to the status of the children of the *t'sip*. It is enough to say that in some respects there is no distinction drawn between them and the children of the *t'sai* while the sons of the *t'sip* have their place in the order of succession to the inheritance and to hereditary dignities. They also share, though not on equal terms, in the patrimony.

"Herr von Mollendorf has compared the unions of the *t'sai* and of the *t'sip* to *connubium* and *concubinatus* respectively. This may stand as a rough comparison. The union of the *t'sai* approaches *justae nuptiae* as nearly as the East can approach the West. But whereas the offspring of *concubinatus* did not come under the *patria potestas* except by process of legitimation, the offspring of the *t'sip* are subject to it as an incident of their birth.

"English law cannot conceive of varying degrees of legitimacy of birth or marriage. Birth can be either legitimate or illegitimate and the union between man and woman can be either lawful or illicit. There is no middle state. It does not seem possible to interpret the status of the children of the *t'sip* as anything but that of legitimate children. They are fully recognised. Nor does it seem possible to hold that children whom we must accept as legitimate can have sprung from an union which remains illicit.

“China is a land of general inversion according to Western ideas. In the West legitimacy of offspring depends on the lawful character of the union from which they come.

“Conversely, the offspring of the *t'sip* being recognised as legitimate, the union from which they come must be regarded as lawful.

“English law again does not recognise any intermediate system between monogamy and polygamy and I cannot see how it is open to us to attribute to the *t'sip* any status than that of a polygamous wife.”

It will be seen, then, that English law has been mated by our Judges to Chinese law and from the union a half-easte offspring has resulted. It is no fault of the Judges: they have had the almost impossible task of welding Eastern ideas into Western law. What they have done has resulted in very fair justice and those who readily clamour for legislation on the subject of Chinese marriages would do well to remember that several of the best lawyers we have had here have tried their hands on the subject and dropped it. The plain unvarnished fact that governs the whole matter is that the views of the Chinese of this Colony are so very divergent that legislation is practically impossible.

In the Federated Malay States Chinese custom is alone observed but, then, the common law of England does not run there, as it does here.

In conclusion it may be observed that the Manchu Code (Ta Ching Lu Li), the most comprehensive source for Western students of Chinese Law, was promulgated in 1647 by the Chinese Justinian, the Emperor Shun Chi. It consists of the Lu, corresponding to the first three parts of Justinian's Pandects, and the Li, answering to that Emperor's Novellae. It was to the Lu, as translated by Sir George Staunton and published in London in 1810, that our Courts have gone chiefly for their information. Staunton was, as is well known, an attaché of the first British diplomatic mission to China in 1793. Practically no epitome of Chinese law has appeared since his work.

Lastly it must be remembered always that in the Chinese mind law (*lu li*) and general custom (*kuei chu*) are mixed up and cannot be separated. Chinese family law, in particular, is not purely a matter of law but includes a large number of general usages.

The difficulties which our Courts have had to overcome cannot be understated and the writer can speak with very personal feeling as to the difficulty in arriving at the precise Chinese law on any subject that presents itself to any one who can neither read nor speak the Chinese language.